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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 367

UNITED STATES OF AMERICA,
Appellant.

vs.

BLISS & LAUGHLIN, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM.

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INDEX.

	PAGE
Motion to affirm	1
Statement	1
Argument	3
There Is No Substantial Question	3
Line of Commerce	5
Section of the Country	6
Substantial Lessening of Competition	10
(a) Market Shares	11
(b) National Firms in Local Competition	12
(c) Tendency Toward Concentration	12
(d) The Economic Factors in the Steel Industry	13
Conclusion	14

CITATIONS.

Cases.

Brown Shoe Co. v. United States, 370 U. S. 294 (1962) 3, 4, 5, 6, 7, 8, 12, 14

Crown Zellerbach Corp. v. Federal Trade Commission, 296 F. 2d 800 (C. A. 9, 1961), cert. den. 370 U. S. 937 (1962) 5, 7

Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 (1961) 7, 8

United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S. D. N. Y., 1958) 3, 4, 5, 8, 9, 10

Statute:

Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, Sec. 7 (15 U. S. C. 18) 1, 2, 3, 4, 5, 6, 7, 10, 13, 14

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from the final judgment and decree entered on March 27, 1962 by the District Court dismissing the Government's complaint brought under Section 7 of the Clayton Act, 15 U. S. C. 18, alleging the

invalidity of the acquisition by Bliss & Laughlin, Inc. (Bliss) of the assets of Sierra Drawn Steel Corp. (Sierra). The Government filed its Jurisdictional Statement (Jursd. St.) in this Court on August 22, 1962.

The complaint alleges that the acquisition of the assets of Sierra by Bliss would tend substantially to lessen competition or create a monopoly in the production and sale of cold finished steel bars in the area consisting of the states of California, Oregon, Washington and Arizona. The District Court's final judgment containing its findings of fact (Fdgs.) and conclusions of law (Concl.) is set forth in appellant's Jurisdictional Statement as Appendix B. In summary the District Court found that

(1) the production and sale of cold finished steel bars do not constitute a line of commerce (Fdgs. 21-140),

(2) assuming that the production and sale of cold finished steel bars do constitute a line of commerce, the area of California, Washington, Oregon and Arizona does not constitute an appropriate section of the country for measuring the effect of the challenged acquisition (Fdgs. 141-167), and

(3) assuming that the production and sale of cold finished steel bars do constitute the relevant line of commerce and that the aforesaid four-state area is an appropriate section of the country for Section 7 purposes, even then the acquisition of Sierra's assets by Bliss does not have the reasonable probability of substantially lessening competition (Fdgs. 168-260).

ARGUMENT.

The decision of the District Court is plainly correct.

There Is No Substantial Question.

The instant case presents no question of substantial importance in the enforcement of Section 7. The Government contends that (1) the District Court applied improper standards in determining the "line of commerce," "section of the country" and "substantial lessening of competition," factors involved in every Section 7 case, and (2) the decision below raises particular uncertainties about the effectiveness of the Act as applied to mergers in the steel industry (Jursd. St. 10).

This Court as recently as June 25 of this year comprehensively construed Section 7 of the Clayton Act, *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962). There is no need to do it again. The decision below raises no question about the effectiveness of "the Act as applied to mergers in the steel industry." See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y., 1958), cited with approval frequently in *Brown Shoe*. *Bethlehem* as approved by this Court provides guidelines for the application of Section 7 to "mergers in the steel industry" which are as certain as our judicial system can provide.

The Government seeks reconsideration by the District Court which "will at least present ultimately for review a decision explicitly focused on the standards set forth in *Brown Shoe*" (Jursd. St. 24). Thus, the Government is asking this Court ultimately to review a lengthy and detailed record merely to reiterate standards to be applied

in Section 7 cases which this Court established at its last term. Even if it were desirable for this Court to decide a Section 7 case this term, it is clear upon a reading of the District Court's opinion and findings as a whole, the standards applied by the District Court are consistent with *Brown Shoe* and *Bethlehem*.

The Government in appealing to this Court is really seeking to overturn findings of fact which are well supported by the record below. *Brown Shoe* establishes that every case under Section 7 is unique and must be decided on its own facts.[1] The District Court decided this case correctly on its own facts.

This motion to affirm should be granted if the decision below is correct with respect to any one of the three essential issues, "line of commerce," "section of the country," "substantial lessening of competition," as to each of which the findings are adverse to the Government. The District Court, although finding that the Government did not prove "line of commerce," accepted its contentions for the purpose of considering the "section of the country" (Fdg. 141). Then for the purpose of measuring the effect of the acquisition on competition the District Court accepted the Government's contentions as to both "line of commerce" and "section of the country" (Fdg. 168). The District Court then found that there is no tendency of the acquisition of Sierra's assets by Bliss to lessen competition even accepting the Government's "line of commerce" and "section of the country" (Fdgs. 169-170).

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1. "* * * Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 321-322 (1962); also see footnote 38 at page 322: "* * * both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case."

In considering the impact of this challenged acquisition on competition, it is significant that neither Bliss nor Sierra compares in size or scope of operation with the large integrated companies against which the sanctions of Section 7 of the Clayton Act have been invoked in *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962), *Crown Zellerbach Corp. v. Federal Trade Commission*, 296 F. 2d 800 (C. A. 9, 1961), cert. den. 370 U. S. 937 (1962), and *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y., 1958).

The Government challenges only one of the District Court's Findings of Fact as being clearly erroneous (Fdg. 148, Jurisd. St. 16, ftnote. 8) but argues that improper standards were applied in arriving at the final judgment below. We turn to the questions as presented in the Jurisdictional Statement to demonstrate that the District Court applied proper Section 7 standards.

Line of Commerce

In our view, this Court in *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962), established that "line of commerce" was to be determined by examining all of the available "practical indicia." There is no set formula for such a determination and no one factor is conclusive. After a comprehensive examination of the great volume of evidence presented relating to "line of commerce," the District Court determined that the Government had failed to prove that the production and sale of cold finished steel bars constitute a "line of commerce" (Fdg. 26).[2]

2 This determination was supported by detailed factual findings none of which is challenged. Products used for same uses as cold finished steel bars: Fdgs. 30, 34-38, 40-80, 86-140; most vendors of cold finished steel bars are not specialized but sell and produce other products often for same end use: Fdgs. 164, 203, 204, 209, 210-225; customers are not distinct in that they buy other

Section of the Country.

Although a geographic submarket of the United States *may* be considered the appropriate "section of the country" for Section 7 purposes, the geographic market selected must "both 'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co. v. United States*, 370 U. S. 294, 336 (1962). The District Court in the instant case found that the area of California, Washington, Oregon and Arizona did not constitute an appropriate geographic market (Fdgs. 141-167; Concl. 3). In so concluding the District Court followed "a pragmatic, factual approach."[3] That this four-state area neither corresponds to the commercial realities of the industry nor is economically significant is clearly demonstrated by Findings of Fact 143 through 167.

The Government's contention is that the one fact alone that Sierra's sales and a small part of Bliss' sales were to customers in California, Washington, Oregon and Arizona would constitute that area an appropriate section of the country for Section 7 purposes (Jursd. St. pp. 15-16). Thus the Government's test for determining geographic market would ignore the commercial realities of the industry and lead to the selection of geographic areas which are not economically significant.

The Government places much reliance on the example given in this Court's footnote 65 at page 337 of *Brown*

products both for re-sale in the case of steel service centers and for the same end use in case of both screw machine shops and manufacturers. Fdgs. 9, 241, 246, 247, 37-39, 86-140; cold finished steel bars do not have peculiar characteristics because there are other products with the same characteristics. Fdgs. 15, 46.

3. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*, 370 U. S. 294, 336 (1962).

Shoe. This Court in the body of its opinion at the same page states:

> "The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, *in itself*, place their merger outside the scope of § 7." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 337 (1962). (Emphasis supplied.)

The Government reads this language to mean that the above fact, *in itself*, places the merger within the scope of Section 7. In our view, this language cannot be construed to mean that the geographic area in which the two firms compete is the relevant geographic market for Section 7 purposes regardless of all other considerations, *i.e.*, commercial realities of the *industry* and economic significance of the area. Indeed "[t]he fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated" would be a factor tending to place their merger outside of the scope of Section 7. The District Court did not rely on this one fact alone in determining that the area of four western states was not the appropriate section of the country.

The commercial realities are that West Coast purchasers of cold finished steel bars look to producers from outside of that area for most of their purchases,[4] the determinants of price and supply lie outside the area, there are no economic obstacles to shipments from outside,[5] the area

4. A factual situation like that in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961); contrasted with the factual situation in *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (C. A. 9, 1961), cert. den. 370 U. S. 937 (1962).

5. At page 16 of the Jurisdictional Statement the Government refers to "freight costs" as evidence substantiating the "relative independence" of the four-state area. There is no mention of "freight costs" in the transcript at the pages cited as a reference supporting this statement. The Government never presented any

is an insignificant producing center, from the standpoint of consumption it is insignificant, and almost all sellers compete on a national basis (Fdgs. 143-167). Because of these same factors this four-state area is not economically significant.

The Government interprets this Court's phrase "economically significant" in *Brown Shoe* to have only a quantitative meaning (Jursd. St. 16). The fact of the sale of 67,306 tons of cold finished steel bars in this area standing alone does not make the area "economically significant" as we understand this Court. Cf. *Tampa Electric Co.*, v. *Nashville Coal Co.*, 365 U. S. 320 (1961). The volume of sales in the area would be only one of many factors to be considered in a "pragmatic, factual approach to the definition of a relevant market." The District Court considered a wide range of economic factors as shown by the Findings of Fact. Moreover, the District Court specifically found that the volume of sales of cold finished steel bars in this area was unimportant and insignificant on a national basis (Fdg. 157) even though all of the forty-seven or more producers in the United States could sell there (Fdgs. 193, 250).

The Government's reliance on *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y., 1958), is misplaced since this case is consistent with the decision below. In *Bethlehem* the defendants contended that the appropriate sections of the country for consideration were the Eastern, Mid-Continent and Western parts, 168 F. Supp. at 596. The Government disputed such a partitioning of the United States although in the instant case it inconsistently urges a Western section of the country. The

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evidence of "freight costs" as an obstacle to shipments into this area and the facts clearly show that the preponderance of cold finished steel bars used in the area was shipped in from outside even from as far east as Camden, N. J. (Fdgs. 147, 148, 259, GX 1, Tr. 35, 37).

Court in *Bethlehem* rejected the defendants' proposal with a statement which aptly describes the Governments' efforts in the instant case:

> "The defendants' tri-partite division of the country is an obvious gerrymandering of the country to meet the exigencies of this case. Neither the industry nor any industry publication has ever recognized this empiric division." 168 F. Supp. 576, 599.

In *Bethlehem* it was held that the entire United States is a relevant market for the steel industry as a whole and for all of the various classes of steel products considered. In addition the Court there found that there were five regional submarkets for the steel industry as a whole and for certain of the various classes of steel products. 168 F. Supp. 576, 603. The Western part of the United States was not found to be a relevant market for any steel product. In determining the regional submarkets the Court relied upon the facts that each such submarket was an area in itself of substantial production or consumption of the steel product for which it was held to be a "section of the country." 168 F. Supp. 576, 601-602. In the instant case the four-state western area was found to be an unimportant and insignificant region.[6]

[6] (1) Northeast quadrant of U. S.—
90% of capacity and production 83% of national consumption.

(2) Four-state area of Michigan, Ohio, Pennsylvania and New York—
48.3% of total industry shipments of "common finished steel products."

(3) Michigan and Ohio—
31.3% of industry shipments.

(4) Michigan—
18.2% of industry shipments ("The defendants concede that Michigan is large enough and important enough to be analyzed separately." 168 F. Supp. at 602.

(5) Ohio—
13.1% of industry shipments.

for both the production (1.3% of national production) and consumption (about 4% of national production consumed in this area) (Fdgs. 155, 157).

It is therefore apparent that the standards applied by the District Court in determining the relevant geographic market are consistent with those used in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y., 1958), as well as with the standards of *Brown Shoe*.

Substantial Lessening of Competition.

The District Court considered all of the relevant factors and determined that this acquisition does not have the proscribed effect on competition even accepting the government's "line of commerce" and "section of the county". It found:

> "In the production and sale of cold finished steel bars in the states of California, Oregon, Washington and Arizona, there is an abundance of capacity and of competing sellers, a wide choice of suppliers among which the purchasers may choose, a lack of obstacles restraining new entrants into the business, and a lack of power in the defendant to affect prices, supply, or entry. All of these factors tend to insure vigorous competition." (Fdg. 179)

We do not understand that this Court intended that the "factors which the Court found dispositive in its analysis of the horizontal aspects of the Brown-Kinney merger (370 U. S. at 343-346)" are the only factors to be considered in all other Section 7 cases involving horizontal mergers (Jurisd. St. 20). "Market shares" and "concentration" are of very little significance where the acquired company which is alleged to have such a large market share did not even sell a full line of cold finished steel bars (Fdg. 186) and was only a one million dollar company (Fdg. 1). After gerrymandering the geographic and product markets, how-

ever, the Government argues these theories in support of its case and we shall comment briefly thereon (Juris. St. 20, 21).

(a) Market Shares.

The Government never proved the total volume of sales of cold finished steel bars in the four-state western area and therefore there is no proof of market shares (Fdgs. 243, 244, 253, 254[7]). In footnote 2 of its Jurisdictional Statement at page 5 the Government attempts to by-pass this glaring deficiency in its proof with the following statement:

> "The government economist who compiled these statistics testified that they resulted from investigation of, and inquiry to, all companies which might possibly sell in the four-state area (Tr. 447-48, 451)."

On cross-examination, however, the government economist, Gaffey, stated that he did not contact all of the producers of cold finished steel bars in the United States or even all listed in the 1960 Directory of the American Iron and Steel Institute (Deft. Ex. SS Tr. 843, 844) to inquire of their sales in the West (Tr. 464-465). "All of the producers of cold finished steel bars in the United States are either actual or potential competitors in the sale of cold finished steel bars in California, Oregon, Washington and Arizona" (Fdg. 193). The record fully supports the statement in Finding 244 that "The techniques which the plaintiff's witness Gaffey testified to as having been used by the plaintiff in preparation of Plaintiff's Exhibit 1 further indicate that it is an incomplete computation of producers shipping cold finished steel bars into

7. GX 1 (Tr. 35, 37), Deft. Ex. A41 (Tr. 1035, 1084), A42 (Tr. 1035, 1085), A44 (Tr. 1070, 1081), A57 (Tr. 1141, 1169), A58 (Tr. 1141, 1170), A61 (Tr. 1141, 1190), A62 (Tr. 1192, 1236), SS (Tr. 843, 844); Tr. 194-195, 229, 656-657, 1009-1010, 1142-1144, 1154-1156, 1196-1197.

California, Washington, Oregon and Arizona in the years 1957, 1959 and 1960." (Tr. 464-465, Deft. Ex's. S8 (Tr. 843, 844) and A61 (Tr. 1141, 1190.)*

(b) National Firms in Local Competition.

Bliss is a small non-integrated steel company and especially so when compared with its competitors (Fdgs. 210-227). The position of Bliss in the market place is even weaker than its small size would indicate because it does not produce the hot rolled bar from which the cold finished steel bar is converted but must buy it from competitors. Prices at which Bliss sells cold finished steel bars are largely determined by the prices it pays for hot rolled steel bars (Fdgs. 181, 199, 231). The acquiring company in *Brown Shoe* occupies a position comparable not to Bliss but to its competitors, U. S. Steel, Bethlehem, Republic, Jones & Laughlin, Copperweld, Crucible, Timken, etc. (Fdgs. 210-229). All of the assets of Sierra were acquired for only $1,100,000 (Fdg. 1).

(c) Tendency Toward Concentration.

There certainly has been no tendency toward concentration in the relevant geographic market even as selected by the Government (Fdgs. 179, 192, 193, 200-209). The Government attempts to make a point of Republic Steel Corporation's acquistion of a California firm "shortly after World War II" (Jursd. St. 22) to show a tendency

8. Moreover, with respect to the completeness of the "investigation" made by the government economist, Gaffey, in compiling statistics, he testified that he "was unable to get any figures" of imports of cold finished steel bars (Tr. 601-602). Yet Bliss introduced evidence of imports obtained from the U. S. Government itself (Deft. Ex's. A56 (Tr. 1141, 1170), A57 (Tr. 1141, 1169), A58 (Tr. 1141, 1170)) which provides the basis for Fdg. 249. His inability even to get data of imports from his own Government further illustrates the incompleteness of Gaffey's investigation and casts doubt on his testimony.

toward concentration. The undisputed facts are that six new firms have commenced "producing and selling cold finished steel bars in the four-state area since 1941; and at least four of these firms, including Sierra, Pacific Tube, M & A and Rods, Inc. have entered this business since the end of World War II." (Fdg. 200.) There is no evidence of a history of acquisitions of producers of cold finished steel bars by anyone.

There is no validity to the Government's discussion of "concentration" (Jursd. St. 21) since as we have shown above there is no proof of total sales or market shares.[9]

(d) The Economic Factors in the Steel Industry.

Viewed in the context of the steel industry, this acquisition could not lessen competition. Surely Section 7 was not enacted to protect large integrated steel companies such as U. S. Steel, Bethlehem, Republic, Jones & Laughlin, *et al.*, from Bliss. It would seem obvious that because of their great financial power, multi-product lines, degree of integration and control of the hot rolled bars, these gigantic steel companies are the determining factors in competition and could wipe out Bliss any time they so desired (Fdgs. 210-233).

Although Sierra was not a failing business at the time of the acquisition it was a very small one with inadequate resources as compared with most of its competitors. Its principal plant was located on premises occupied under a lease with an expiration date of February 28, 1962 which was about one year after the acquisition (Fdgs. 1 and 4). Bliss had no plant on the West Coast prior to acquiring Sierra whereas the dominant Republic Steel did and the acquisition fostered competition between the combined company and Republic.

9. At page 21 and footnote 12 of the Jurisdictional Statement the Government refers to "a recent study—on a national scale." We note that this "recent study" is *dehors* the record.

The two merging companies were minute as viewed in the context of the steel industry (Fdgs. 5, 227, 228). All of the assets of Sierra were acquired by Bliss for only $1,100,000 worth of its stock (Fdg. 1). Congress did not intend to block all mergers except those which are *de minimis*. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 319, 320 (1962). If this acquisition is held to be invalid under Section 7, then no horizontal merger other than those considered *de minimis* will escape the prohibition of this Act once the Government sues, since it could always gerrymander the "section of the country" and "line of commerce" to meet the exigencies of the case it files. Thus the Government will have a veto over all mergers and thwart Congressional intent.

CONCLUSION.

For the foregoing reasons the decision of the District Court was clearly correct. Section 7 of the Clayton Act has been construed very recently in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). The District Court properly followed the applicable standards set forth in *Brown Shoe* and properly decided the case on its own facts. The appellant has failed to demonstrate that the Findings of Fact are clearly erroneous. There is therefore no substantial question presented for determination by this Court. Accordingly we request that the motion to affirm the final judgment of the District Court be granted.

Respectfully submitted.

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